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No. 87-1918

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

NATIONAL MEDIATION BOARD, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DEBORAH BOLLER, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONSE OF INDIVIDUAL RESPONDENTS BOLLER, *ET AL.* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether judicial review under Section 2, Ninth of the Railway Labor Act attaches to a certification in which the National Mediation Board deliberately disenfranchises 302 eligible employees in order to ensure unionization of the carrier because, as the court of appeals decided, the National Mediation Board is authorized under the Act to engage in non-neutral election activities.*

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*Respondents here are TWA passenger service employees Deborah K. Boller, Daniel W. Asplund, Lucy M. Houston, and William E. Craig.

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SUPREME COURT OF THE UNITED STATES

TRANS WORLD AIRLINES, INC.,

Petitioner,

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NATIONAL MEDIATION BOARD, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DEBORAH BOLLER, ET AL.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondents Deborah K. Boller, Daniel W. Asplund, Lucy M. Houston and William E. Craig respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above styled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 839 F.2d

809 (D.C. Cir. 1988). The opinion of the United States District Court for the District of Columbia is reported at 654 F.Supp. 447 (D.D.C. 1987). The Determination of Eligibility-Order of the National Mediation Board is reported at 13 N.M.B. No. 63 (1986).

JURISDICTION

Respondents accept Petitioner's statement of the Court's jurisdiction.

STATUTES INVOLVED

Respondents accept Petitioner's statement of the statutes involved under the Railway Labor Act, 45 U.S.C. §151 et. seq.

INTRODUCTION

The individual respondents here, all Texas residents, filed a complaint, prior to the action filed by TWA, in the United States District Court for the Southern District of Texas on June 10, 1986.[1] That

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[1]The original complaint was filed by Deborah K. Boller and Thomas R. Rhodes.
(continued...)

case was consolidated with TWA's complaint and transferred, over the objection of respondent Boller and TWA, to the United States District Court for the District of Columbia. Boller v. National Mediation Board, 647 F.Supp. 1060 (S.D.Tx. 1986). The District Court ruled that the Board had not acted in gross disregard of the individual respondents' rights, ordered TWA to treat with the union, and issued an injunction prohibiting TWA from implementing any unilateral changes in working conditions of the passenger service employee craft or class without the union's concurrence. Both TWA and the individual respondents filed separate appeals on the merits from the district court's decision. (J.A. 688, 691). Those appeals were consolidated by the court of appeals and dis-

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[1](...continued)
Shortly after the filing, Mr. Rhodes died (R-18; J.A. 3) and the other individual respondents were added. (R-18, J.A. 11).

posed of concurrently.

REASONS FOR GRANTING THE WRIT

Petitioner correctly points out first, that the circumstances surrounding the decision-making process of the Board in the present case, raises a specific issue of whether the Board's exercise of non-neutrality in order to influence the outcome of the election is authorized by the Act. Second, petitioner shows that the Board's decree that the individual respondents here and their fellow passenger service employees who chose to assist TWA during the flight attendants strike were working permanently outside the craft or class, and not on temporary assignment, is legally erroneous.

1. In Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297 (1943) ("Switchmen"), this Court considered the statutory question whether jurisdiction to review "suits and proceed-

ings arising under any law regulating commerce," 28 U.S.C. §41(8) [now 28 U.S.C. §1337(a)], allowed judicial review of a Board certification that described the perimeters of a collective-bargaining unit: "what is the appropriate craft or class in which the election should be held." 320 U.S. at 301. Yet, the Court also concluded in Switchmen, from its previously decided cases, that there is a strong inference of general jurisdiction in the federal courts where a right created by Congress might be obliterated. "In those cases, it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act." 320 U.S. at 300.

In deciding that the job descriptions to be joined together for the craft or class designation would reside solely with

the Board, the Court noted that this was not a case where "the 'right' of collective bargaining without a legal sanction would rob the Act of its vitality and thwart[ed] its purpose," but rather, that "[s]uch considerations are not applicable here." Id. Moreover, the Court observed that "[a]ll constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced." 320 U.S. at 301.

The Court construed that "§2, Fourth unites into law the 'right' of the 'majority of any craft or class of employees' to determine who shall be the representative of the class or craft for the purposes of this Act." 320 U.S. at 300-01. In the exercise of this right, the Court stressed the nature of the neutrality which the Board was to take in these matters, at several points in Switchmen, by citing to the statement of Commissioner Eastman

"that it was very important 'to provide a neutral tribunal which can make the decision and get the matter settled,'" 320 U.S. at 303, and by stating that "[t]he function of the Board under §2, Ninth is more the function of a referee." 320 U.S. at 304. Hence, the Court in resolving the discretionary nature of the crafts or classes selected by the Board did not need to implicate the question whether the lack of judicial review in the matter would endorse a loss of employee statutory rights and thus, "[w]e need not determine the full reach of that rule." 320 U.S. at 303.

In Brotherhood of Railway and Steamship Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650 (1963), the Court reaffirmed the Board's duty that it "perform the 'function of a referee.'" 380 U.S. at 667. In determining whether that function was fulfilled in

the case, viz, the duty to investigate the dispute under §2, Ninth, the Court engaged in a thorough inquiry into how the Board's craft or class determination developed in the case consistent with its industry experience with other carriers. The case might have turned out differently, if in the Board's duty to investigate, it had failed to determine the underlying facts of the matter, as it had failed to do in Virginia Ry. Co. System Federation No. 40, 300 U.S. 515 (1937), thus leaving "the omitted fact open to inquiry." 300 U.S. at 562. Non-Contract, 380 U.S. at 661 n.2.

In the case at bar, there is an uncontested affidavit in the record by a member of the bar of this Court, that the Board's mediator, on the day the mail-in ballots were impounded, stated that "we know what ballots we have." (155a). Moreover, the Teamsters were explained by

the Board's mediator to be "pressuring the Board." (155a-56a). On the basis of these uncontested facts, the Board could know in advance that any decision concerning the eligibility of the contingent flight attendants raised by the Teamsters would be outcome determinative.[2]

Petitioner attempted to obtain answers to interrogatories (124a) which might unravel the puzzling Board action, but the district court refused to permit the discovery. (20a n.4). Similarly, the individual respondents were denied the opportunity to depose Mediator Anderson which would have either corroborated the issue

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[2]The Board was advised of the number of bargaining unit employees by petitioner prior to the election. Under the Board's rules, a majority of employees must return ballots in order to certify the election. At the time of the eligibility decision, the Board must have known that a majority of employee ballots had not been returned, since it maintains custody of the ballots. Therefore, by eliminating a class of eligible employees, a majority response could be created to ensure unionization.

of outside interference and non-neutrality or enabled the Board to move for summary judgment on that question. Neither opportunities were made available to the parties and the record accordingly remains equivocal.[3]

The shadow of impropriety cast on these proceedings involving employee exercise of §2, Fourth rights, do not fade from judicial review simply because the

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[3]The National Labor Relations Board would not tolerate any such appearance of impropriety in the conduct of its elections. In Hudson Aviation Systems, Inc., 288 N.L.R.B. No. 94 (April 29, 1988), the Board recently overturned an election won by the union (26-5), because the Board agent at the polling area engaged in a "loud argument" with an assistant manager which "communicated the impression that the Board was displeased with and was criticizing the employer's assistant manager and, thereby undermined the indispensible perception of Board neutrality in the election." Hence, the National Labor Relations Board refuses to certify election results where actions destroy confidence in its election process or reasonably could be interpreted as impugning the standards of integrity and neutrality which the Board seeks to maintain in elections. Id. at n.4.

case involves the NMB. But, the court of appeals countenanced the activities by holding "there is no express duty of neutrality" in the Act because "[t]he word neutral does not occur as an adjective modifying the Board itself." (5a). This interpretation of the Board's non-neutral duty to investigate is claimed without a basis in this Court's precedent. As set out above in Switchmen's, this Court plainly considered the Board a neutral referee in cases arising under the RLA, not a proponent agency for any party. The Circuit Court's rendition that the Board was not constrained to be non-neutral (5a) and invention of the "gross violation of the statute" standard of review similarly are not grounded in any ruling enunciated by this Court.

3. Petitioner also correctly demonstrates that the Board's underlying decision that the contingent flight atten-

dants, such as Boller, Asplund and Craig, were not on limited temporary duty for TWA but were working permanently outside the craft or class of passenger service employees, renders the Board's decision in the matter contrary to the undisputed facts.

The court of appeals correctly understood that the individual plaintiffs were not on permanent assignment as flight attendants and that the facts of the case simply don't support any conclusion that the flight duty was anything else but temporary in nature:

> The employees in question, including individual plaintiffs in this action, were concededly on temporary assignment as flight attendants. All were regularly employed as passenger service employees within the bargaining unit relevant to the controversy out of which the disputed election arose. As passenger service employees, they enjoyed higher wages than flight attendants and accepted volunteer assignments after TWA's announcement that they would retain their current job title, salary, benefits, status, and seniority.

(3a)(emphasis added).

The court of appeals then itself distinguished the prior Board decision in Trans World Airways, Inc. 8 N.M.B. 663 (1981), which the Board "purportedly" relied upon to disenfranchise the 302 workers. The court noted that in the above cited case, the employees "were actually on permanent assignment . . . not paralleled by the concededly temporary flight service attendants who desired to vote on the craft or class of their regular employment" here. (3a-4a).

The court of appeals also noted the inconsistency of the Board's eligibility order in the case at bar with Section 5.302 of its representation manual that temporary status does not accrue to "employees who are regularly working" elsewhere for the same carrier. (4a). To these matters of fact, the court found that "[c]ertainly, their argument is an

appealing one. Unfortunately for plaintiffs, both the District Court and this Court are without the power to grant the relief prayed. Judicial review of NMB decisions is one of the narrowest known to the law." (4a-5a).

In basing its abdication of judicial review in this case on Non-Contract Employees and Switchmen's the court of appeals misreads this Court's decision in a manner distinctly at odds with the intent not to rob the Act of its vitality and purpose by denying general jurisdiction where the great "right" of majority rule has been compromised. Switchmen's 320 U.S. at 300. The court of appeals recognized the intrusion the decision had on majority rights when it noted that "the treatment of these employees certainly does not cast the NMB in a very favorable light. . . ." (6a).

Especially disturbing for employees

in this industry is the court of appeals' invitation to the Board to actively meddle in the exercise of employee rights in future election cases for "there is no express statutory duty of neutrality, even if plaintiffs' complaints were taken to adequately allege a violation of such duty." (5a)(emphasis added). This situation, the court of appeals so states, would "not disclose a 'gross violation of the statute'" either. Id. Such a statement of law cannot be permitted to authorize a federal agency to whimsically deny express statutory rights unless Congress' decision to give it the power to do so is absolutely clear. The court of appeals decision in this manner represents a grave threat to the exercise of employee statutory rights under Section 2, Fourth of the Railway Labor Act.

CONCLUSION

For the reasons set out above, this Court should grant the petition.

Respectfully submitted,

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